Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs

1986

The State of Utah v. One 1982 Silver Honda Motor-Cycle : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1

 Part of the Law Commons

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.
David L. Wilkinson; Utah Attorney General; Diane W. Wilkins; Assistant Attorney General; Attorney for Respondent.
Walker E. Anderson; Attorney for Appellant.

Recommended Citation
Brief of Respondent, *Utah v. One 1982 Silver Honda Motor-Cycle*, No. 860206.00 (Utah Supreme Court, 1986).
https://digitalcommons.law.byu.edu/byu_sc1/1091

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

BRIEF
UTAH
DOCUMENT
KFU
50
.A10
DOCKET NO. 860206

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff/Respondent,	:	Case No. 860206
v.	:	
ONE 1982 SILVER HONDA MOTOR-CYLE, Utah Registration 5P218, VIN IHFSCO229CA235970,	:	Category No. 13b
Defendant/Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF FORFEITURE IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE PHILIP R. FISHLER, PRESIDING.

DAVID L. WILKINSON
Attorney General
DIANE W. WILKINS
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

WALKER E. ANDERSON
660 South 200 East, #100
Salt Lake City, Utah 84111

Attorney for Appellant

FILED
DEC 1 1986
Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff/Respondent,	:	Case No. 860206
v.	:	
ONE 1982 SILVER HONDA MOTOR-CYLE, Utah Registration 5P218, VIN IHFSCO229CA235970,	:	Category No. 13b
Defendant/Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF FORFEITURE IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE PHILIP R. FISHLER, PRESIDING.

DAVID L. WILKINSON
Attorney General
DIANE W. WILKINS
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

WALKER E. ANDERSON
660 South 200 East, #100
Salt Lake City, Utah 84111

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

STATUTES CITED

STATEMENT OF ISSUES

The following issues are presented in this appeal:

1. Is the evidence insufficient to support the judgment of forfeiture?

2. Did the trial court abuse its discretion in forfeiting the motorcycle and denying defendant's motions to suppress and dismiss?

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff/Respondent,	:	Case No. 860206
v.	:	
ONE 1982 SILVER HONDA MOTOR-CYLE, Utah Registration 5P218, VIN IHFSCO229CA235970,	:	Category No. 13b
Defendant/Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Verd Erickson, owner of defendant 1982 silver Honda motorcycle, was charged by information with three counts of unlawful distribution for value of a controlled substance, a second degree felony, under Utah Code Ann. § 58-37-8(1)(a)(ii) (Supp. 1985), of which he was convicted. State v. Erickson, 722 P.2d 757 (Utah 1986). Pursuant to Utah Code Ann. § 58-37-13 (1953, as amended) defendant 1982 silver Honda motorcycle was forfeited (R. 72X-72Y).

All statutory references are to Utah Code Ann., 1953 as amended, unless otherwise indicated. Appellant is hereafter referred to as defendant motorcycle.

STATEMENT OF FACTS

Although there were minor conflicts in the testimony received at trial, the following facts are, for the most part, undisputed.

Having received information that Verd Erickson (Erickson), a dentist who had an office in Taylorsville, Utah, was over-prescribing and illegally distributing drugs to his patients, the Metro Narcotics Strike Force arranged to have an undercover officer, Celeste Paquette (Paquette), meet with Erickson at his dental office (R. 136-37). It was decided that two additional officers, Alex Huggard (Huggard) and Foster Mayo (Mayo), would hold surveillance at Erickson's dental office and monitor discussions between Paquette and Erickson by means of a "wire" carried by Paquette (R. 192, 213, 214-15, 235-36, 239, 267). The "wire" transmitted her conversations with Erickson to her fellow narcotics officers who were outside with receiving and recording equipment (R. 214-15, 235-36).

On the morning of May 24, 1985, Paquette, using the name Kris Gordon, arrived at Erickson's dental office with a friend of hers for a dental appointment which had been scheduled the day before (R. 127). Once seated in the dental chair, Paquette informed Erickson that she did not have a problem with her teeth, but was concerned about the effects her ingestion of "speed" (amphetamines) was having on them (R. 138-39). Erickson told her that he would have to examine her teeth before discussing the matter (R. 139). After the examination, Paquette again asked Erickson about the possible problem created by

amphetamines (R. 139). He responded that amphetamines purchased from a pharmacist would be less harmful than those purchased on the street and that she should find a doctor who would write a prescription for amphetamines for her (R. 140). When Paquette indicated that she knew of no one who would write prescriptions for her, Erickson told her he could, but he disliked writing prescriptions because they left a "paper trail" (R. 140). Erickson then said he would write her a prescription and asked her to return to the office at 5:00 p.m. when it was closed (R. 141).

Upon her return to Erickson's office at 5:00 p.m. that same day, Paquette was asked by Erickson's receptionist to come back at 6:00 p.m. (R. 141). At 6:00 p.m., Paquette met with Erickson who asked what she wanted in the line of prescriptions (R. 142). Paquette said she was looking for amphetamines and dexedrine (R. 142). Erickson said he didn't want to write a prescription because that was more dangerous (R. 142). Erickson asked Paquette to wait a minute. Standing in the waiting room and looking through the blinds, Paquette observed him go outside to defendant motorcycle parked in front of his office and watched him take something out of the saddlebag portion of defendant motorcycle (R. 142, 258, 283).[1] When Erickson returned he had a small prescription bottle (R. 142). He dumped the contents of the prescription bottle into his hands (R. 142). The bottle

---

[1] There is no dispute that the defendant motorcycle belongs to Erickson and is the subject of the action which is on appeal (R. 92, 322). There is also no dispute that the estimated value of the defendant motorcycle was $8,200 (R. 328).

contained some yellow tablets and three black capsules, some of which were later identified as amphetamines by the state crime lab (R. 142, 258). After stating that he wanted street value for the drugs, which he identified as biphetamines and amphetamines, Erickson exchanged the drugs for sixty dollars in cash that Paquette offered (R. 143, 257).

During the time Paquette was in Erickson's dental office, Officers Huggard and Mayo were monitoring discussions between Paquette and Erickson and observing the front of the dental office where Erickson's motorcycle was parked (R. 143, 191, 193, 216, 238). Shortly after 6:00 p.m., while Paquette was in Erickson's office, Huggard and Mayo observed a male, who was later identified as Erickson, exit the dental office, walk to defendant motorcycle parked immediately in front of the dental office, go to the back of defendant motorcycle, open a suitcase-like compartment or saddlebag, take a package or some small item out of it, close the compartment, and then walk back inside the dental office (R. 193, 194, 207, 208-09, 215-16, 239-41). They watched as Paquette left the office and Erickson followed, he locked the front door, went to the motorcycle, stood there a minute or so, got on the motorcycle and drove off (R. 198, 241).

As previously arranged, one week later on May 31st Paquette again met Erickson at his dental office (R. 143, 261-62). Erickson asked her how she liked the pills she had received the previous week, and then freely discussed a sale of a large quantity of amphetamines and a small amount of "Demerol" (meperidine) to her for $5,000.00 (R. 261-62). The two agreed to

make the transaction for the amphetamines and Demerol three days later on June 3rd under the pretense that Paquette would be coming into the office to have her teeth cleaned (R. 262-63). On the morning of June 3rd, after cleaning Paquette's teeth, Erickson told her to return at 6:00 p.m. to discuss the deal (R. 263). When Paquette returned at that time, Erickson exchanged the amphetamines and Demerol for $5,000.00 in cash that she had in an envelope (R. 263-64). Immediately thereafter, approximately eight narcotics officers entered Erickson's dental office and arrested him (R. 157-59, 195, 220-221, 264).

After Erickson's arrest, defendant motorcycle, which was parked in front of the dental office, was impounded (R. 183, 231).

At trial below, Erickson admitted all of the facts and allegations, except going out to the defendant motorcycle to get the amphetamines (R. 333).

Erickson was charged under § 58-37-8(1)(a)(ii) with unlawful distribution for value of a controlled substance, a jury found him guilty as charged, and the conviction was affirmed on appeal by this Court. State v. Erickson, 722 P.2d 757 (Utah 1986).

SUMMARY OF ARGUMENT

The evidence presented at trial was sufficient to support the court's judgment of forfeiture.

The trial court did not abuse its discretion in forfeiting the motorcycle and denying defendant's motions to suppress and dismiss.

ARGUMENT

POINT I

SUFFICIENT EVIDENCE WAS PRESENTED AT TRIAL TO SUPPORT THE COURT'S JUDGMENT OF FORFEITURE.

Defendant motorcycle argues that the State presented insufficient evidence at trial to support the judgment of forfeiture. When considering a challenge to the sufficiency of the evidence, this Court has applied the following standard of review:

> This Court will not lightly overturn the findings of a jury. We must view the evidence properly presented at trial in the light most favorable to the jury's verdict, and will only interfere when the evidence is so lacking and insubstantial that a reasonable man could not possibly have reached a verdict beyond a reasonable doubt. We also view in a light most favorable to the jury's verdict those facts which can be reasonably inferred from evidence presented to it.

State v. McCardell, 652 P.2d 942, 945 (Utah 1982) (citations omitted); State v. Nickles, 43 Utah Adv. Rep. 20 (10/7/86). As noted in State v. Booker, 709 P.2d 342 (Utah 1985):

> In reviewing the conviction, we do not substitute our judgment for that of the jury. "It is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses. . . ." State v. Lamm, Utah, 606 P.2d 229, 231 (1980); accord State v. Linden, Utah, 657 P.2d 1364, 1366 (1983). So long as there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made, our inquiry stops.

Id. at 345 (citation omitted). And, even if the Court views the evidence as less than wholly conclusive, or if contrary evidence

or conflicting inferences exist, the verdict should be upheld. State v. Howell, 649 P.2d 91, 97 (Utah 1982). In short, "on conflicting evidence the Court is obliged to accept the version of the facts which support the verdict." State v. Isaacson, 704 P.2d 555, 556 (Utah 1985), citing State v. Howell, 649 P.2d at 93. Circumstantial evidence alone may be competent to establish the guilt of the accused. State v. Clayton, 646 P.2d 723, 725 (Utah 1982). Finally, defendant must show that the evidence was so insubstantial or inclusive that reasonable minds must have entertained sufficient doubt. State v. Dyer, 671 P.2d 142 (Utah 1983).

Verd Erickson, owner of defendant 1983 silver Honda motorcycle, was charged with unlawful distribution for value of a controlled substance after selling amphetamines and Demerol to an undercover narcotics officer (Paquette) on May 24 and June 3, 1985 (R. 143, 157-59, 195, 220-21, 257, 263, 264). On May 24, Paquette twice went to Erickson's dental office while two other officers monitored by "wire" the discussions between Paquette and Erickson and watched the front office from a car outside (R. 127, 141, 142, 143, 191, 193, 216, 238). Erickson's silver 1983 Honda motorcycle was parked in front of the office in plain view of the officers (R. 92, 142, 258, 283, 322). During a discussion with Paquette concerning "speed" and amphetamines, Erickson stated that she should find a doctor who would write a prescription for amphetamines for her (R. 138-40). When she indicated that she knew of no one who would write prescriptions for her, Erickson told her he could, but disliked writing prescriptions because

they left a "paper trail" (R. 140). However, Erickson said he would write her a prescription and asked her to return at 5:00 p.m. when the office closed (R. 141). When she returned at 5:00 p.m., Erickson's receptionist asked her to come back at 6:00 p.m. (R. 141). At 6:00 p.m., Paquette met with Erickson to discuss drugs (R. 142). After Paquette said she was looking for amphetamines and dexidrine, Erickson said he didn't want to write a prescription because it is more dangerous (R. 142). Erickson asked Paquette to wait a minute and left her standing in the waiting room (R. 142). Paquette watched him through the blinds go to defendant motorcycle parked in front of the office and take something out of the saddlebag portion of defendant motorcycle (R. 142, 258, 283). When he returned to her he had a small prescription bottle containing amphetamines which he sold to her for sixty dollars cash (R. 142, 257, 258).

Both Officers Huggard and Mayo, who were sitting in a car in front of the office, also observed Erickson exit the dental office, walk to the defendant motorcycle parked immediately in front of the dental office, go to the back of defendant motorcycle, open the saddlebag compartment, take a package or small item out of it, close the compartment, and then walk back inside the dental office where the sale of drugs took place (R. 192, 194, 207, 208-09, 215-16, 239-41). They also watched Erickson leave the office, lock the door and leave on defendant motorcycle
(R. 198, 241).

The evidence demonstrated that defendant 1983 silver Honda motorcycle was used or intended for use, to transport, or in any manner facilitate the transportation, sale, receipt, possession or concealment of controlled substances and is legally sufficient to support the judgment of forfeiture. Section 58-37-13. The trier of fact, the court, could have reasonably concluded that Erickson used defendant motorcycle to use, conceal, transport or in any manner facilitate the transportation, sale, receipt, possession or concealment of controlled substances in violation of Utah Code Ann., Title 58, Chapter 37, the Utah Controlled Substances Act. The trier of fact could have reasonably found that on May 24, 1985, Paquette purchased contraband from Erickson, that he took contraband amphetamines from defendant motorcycle, and that defendant motorcycle facilitated the transportation, sale, receipt, possession or concealment of the contraband amphetamines.

It is apparent that the court did not accept Erickson's proffer of testimony that he did not go to his motorcycle while talking with Paquette and that no contraband was kept in defendant motorcycle (R. 324). The trial court is under no obligation to accept the version of the facts advanced by defendant's witness, and may disregard them in whole or in part. State v. Pierce, 722 P.2d 780 (Utah 1986). The trial judge, acting as trier of fact, is authorized to determine the credibility of the witness and to believe or disbelieve any witness. State v. Carlson, 638 P.2d 512 (Utah 1981), cert. denied, 455 U.S. 958 (1982). The judge, as the trier of fact, is

not obligated to accept as true a defendant's own version of the evidence nor his self-exculpating statements as to his conduct and intentions. The judge is entitled to use his own judgment as to evidence. State v. Schoenfeld, 545 P.2d 193 (Utah 1976).

Defendant motorcyle's argument that there is no evidence that Erickson put any contraband in or on defendant motorcycle and no evidence that he transported any contraband is unsupported by the facts (Appellant's brief p. 7). Paquette, Huggard and Mayo each testified that they saw Erickson go to defendant motorcycle on May 24, open a suitcase-like compartment or saddlebag, take a package or some small item out of it, close the compartment, and then return to the office (R. 142, 193, 194, 207, 208-09, 215-216, 239-241, 258, 283). Paquette testified that when Erickson returned he had a small prescription bottle containing capsules and tablets which were later identified as drugs (R. 142, 258). Clearly, this testimony established a nexus between the contraband and defendant motorcycle. It is not significant that no photograph was taken of Erickson when he went to the motorcycle. Officer Mayo testified that no photograph was taken when Erickson went to defendant motorcycle because Erickson was "too close to the camera" and Mayo was concerned that Erickson could or would see him photographing the events (R. 127-28).

Defendant motorcycle states that the "evidence does not rise to the dignity of a violation" (Appellant's brief p. 6), but provides no legal analysis in support thereof and therefore this Court should decline to rule on it. State v. Amicone, 689 P.2d

1341 (Utah 1984). Defendant motorcycle relies on U.S. v. One 1972 Datsun, 378 F. Supp. 1200 (D.N.H. 1974). In the Datsun case it was an undisputed fact that the contraband was never transported by or concealed in the vehicle. 378 F. Supp. at 1202. The court determined that since the vehicle had not been used to carry or transport contraband, that no negotiations for the purchase were carried on in the car, and no part of the sale was transacted in the car, the automobile was not subject to forfeiture. In the present case there is evidence that contraband had been concealed or transported in the defendant motorcycle, and therefore the Datsun case analysis is inapplicable. For the same reasons the analysis and holding in U.S. v. One 1976 Ford F-150 Pick-Up, 769 F.2d 525 (8th Cir. 1985) and U.S. v. One 1974 Cadillac Eldorado Vin, 575 F.2d 344 (2nd Cir. 1978) are not controlling.

Further, defendant motorcycle states in the Summary of Argument that the judgment of forfeiture is unduly harsh and extreme punishment (Appellant's brief p. 5), however defendant motorcycle provides no legal analysis in support thereof and based upon State v. Amicone, 689 P.2d 1341 (Utah 1984), this Court should decline to rule on it.

Erickson, owner of defendant motorcycle, was convicted of three counts of unlawful distribution for value of a controlled substance, a second degree felony, § 58-37-8(1)(a)(ii). State v. Erickson, 722 P.2d 757 (Utah 1986). Facts demonstrate that on May 24 Erickson sold Paquette amphetamines for $60 in cash and that the contraband had been obtained from

defendant motorcycle (R. 142, 143, 193, 194, 207, 208-209, 215-216, 239-241, 257, 258, 283). It was undisputed that the estimated value of defendant motorcycle was $8,200 (R. 328).

The amount of contraband drugs has no bearing on a forfeiture pursuant to § 58-37-13(1), which provides as follows:

> (1) The following shall be subject to forfeiture and no property right shall exist in them:
> (a) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this act;
> (b) All raw materials, products, and equipment of any kind used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this act;
> (c) All property used or intended for use as a container for property described in Subsections (1)(a) and (1)(b) of this section;
> (d) All hypodermic needles, syringes and other paraphernalia, not to include capsules used with health food supplements and herbs, used or intended for use to administer controlled substances in violation of this act;
> (e) All conveyances including aircraft, vehicles or vessels used or intended for use, to transport, or concealment of property described in (1)(a) or (1)(b) of this section, except that:
> (i) No conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under this section unless it appears that the owner or other person in charge of the conveyance was a consenting party or privy to violation of this act; and
> (ii) No conveyance shall be forfeited under this section by reason of any act or omission established by the owner to have been committed or omitted without his knowledge or consent; and
> (iii) Any forfeiture of a conveyance subject to a bona fide security interest shall be subject to the interest of the secured party upon the party's showing he could not have known in the exercise of

> reasonable diligence that a violation would take place in the use of the conveyance.
> (f) All books, records, and research, including formulas, microfilm, tapes, and data used or intended for use, in violation of this act.
> (g) Everything of value furnished or intended to be furnished in exchange for a controlled substance in violation of this act, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this act; however, no property shall be forfeited under this subsection, to the extent of the interest of the owner, by reason of any act or omission established by him to have been committed, or omitted without his knowledge or consent. There is a rebuttable presumption that all money, coins, and currency found in close proximity to forfeitable controlled substances, drug manufacturing or distributing paraphernalia, or to forfeitable records of the importation, manufacture, or distribution of controlled substances are forfeitable under this section. The burden of proof shall be upon claimants of the property to rebut this presumption.
> (h) All imitation controlled substances as defined in the Imitation Controlled Substances Act.

Two Utah cases dealing with vehicle forfeiture are State v. One Porsche 2-Door, 526 P.2d 917 (Utah 1974) and State v. One 1983 Pontiac, 717 P.2d 1338 (Utah 1986), which overrules in part State v. One Porsche 2-Door. In State v. One Porsche 2-Door, this Court was concerned not with the quantity of drugs, but rather that the owner-operator of the vehicle was only charged with a Class B misdemeanor and that the fine for the offense did not compare with the enormity of a $10,000 vehicle value. 526 P.2d at 918 and 921. This Court in State v. One 1983 Pontiac stated:

> We affirm that the major thrust of the statute is to strike at those

> involved in the trafficking of drugs, rather than at the individual whose possession is solely for his own consumption. However, we do not read section 58-37-13 to require a showing of a profit motive on the part of the person involved in the transportation and distribution of drugs; to the extent One Porsche is contrary it is overruled. The intent of the legislature in enacting section 58-37-13 was to discourage the manufacture, transportation, and distribution of illegal drugs in this state by allowing the forfeiture of any equipment, container, vehicle, or vessel used to facilitate the transportation, sale, receipt, possession, or concealment of contraband. This intent is clearly manifest from the language of the statute. When the language of the statute is plain and its meaning clear, there is no occasion to search for meaning beyond the statute itself. In re Stevens Estate, 102 Utah 255, 130 P.2d 85 (1942). The district judge in his memorandum decision conceded that the vehicle was used to transport drugs on two occasions, and that the drugs were then sold to undercover officers. These actions are clearly within the language and intent of the statute which allows the forfeiture of the vehicle. The consideration of the lack of profit motive was not warranted by the statute and was an improper basis for denial of the petition.
>
> As for the small amount of drugs involved, "[t]he courts have uniformly held that a vehicle is subject to forfeiture no matter how small the quantity of contraband found." (Emphasis added.)

717 P.2d at 1340 (citations omitted). In the present case Erickson was charged and convicted of three counts of a second degree felony.

The Utah forfeiture statute does not contain any language requiring a certain quantity of drugs before forfeiture, nor does the statute contain any language that the charge must be a felony before forfeiture becomes appropriate. The amount of

drugs transported, possessed or involved is irrelevant. See Calero-Toledo v. Pearson Yacht, 416 U.S. 663, 40 L.Ed.2d 452 (1974); U.S. v. One 1975 Mercedes 280S, 590 F.2d 196 (1978); U.S. v. One 1975 Ford Pickup Truck, 558 F.2d 755 (1977); and U.S. v. One (1) 1982 28' International Vessel, 741 F.2d 1319 (1984). This Court in State v. One 1983 Pontiac recognized "that a vehicle is subject to forfeiture no matter how small the quantity of contraband found." 717 P.2d at 1340 (citations omitted).

The State respectfully submits that under the Utah forfeiture statute and relevant case law, the quantity of the contraband is irrelevant when it comes to forfeiture. Therefore, the trial court properly disregarded the quantity of the drugs involved when determining if forfeiture was appropriate under the law.

The value of the vehicle is irrelevant in a forfeiture proceeding pursuant to § 58-37-13. The statute is clear on its face that the Legislature intended forfeiture without consideration as to the value as compared to the value of the drugs. Section 58-37-13 makes no mention or reference to the value of the vehicle involved. The language is clear and not ambiguous. The Legislature was not concerned with the value of the vehicle which is subject to forfeiture. If the vehicle participated in the transportation, sale, or possession of a controlled substance, the vehicle is subject to forfeiture. The analysis by this Court in State v. One 1983 Pontiac is persuasive and applicable to the facts of the present case.

The facts before the lower court not only indicate the possession of contraband, but also the transportation and trafficking of amphetamines with the intent to distribute and the actual sale of the same for value.

The State respectfully submits that § 58-37-13 is clear on its face and that the lower court properly disregarded the value of the defendant motorcycle in considering whether forfeiture was proper.

Without legal analysis or reference to the record defendant motorcycle states that "Dr. Erickson had no knowledge of any contraband in or on the motorcycle" (Appellant's brief p. 7). Based upon State v. Amicone, 689 P.2d 1341 (Utah 1984) this Court should decline to rule on the argument. However, the facts demonstrate that Erickson, the owner of defendant motorcycle, not only knew or should have known that the contraband was concealed on defendant motorcycle, but was in fact the one who committed the illegal acts. Therefore, the suggestion that he lacked knowledge is not only without merit, but frivolous. Erickson was convicted of three counts of unlawful distribution for value of a controlled substance, a second degree felony. State v. Erickson, 722 P.2d 757 (Utah 1986). The facts demonstrated that on May 24 Erickson sold Paquette contraband and that he had obtained the contraband from defendant motorcycle (R. 142, 143, 193, 194, 207, 208-209, 215-216, 239-241, 257, 258, 283). In citing § 58-37-13(e)(ii) defendant motorcycle is apparently claiming an exception for Erickson thereunder. Section 58-37-13(e)(ii) provides:

> (ii) No conveyance shall be forfeited under this section by reason of any act or omission established by the owner to have been committed or omitted without his knowledge or consent; and

It is clear that the exceptions from forfeiture under the statute are to protect the interest of innocent others in the vehicle. The facts in the present case do not give rise to an exception under § 58-37-13(e)(ii). Erickson is not an innocent other who is in need of protection. Therefore, the forfeiture was proper.

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FORFEITING THE MOTORCYCLE AND DENYING MOTIONS TO SUPPRESS AND DISMISS.

In argument heading II defendant motorcycle argues "the trial court erred and abused its discretion (1) in failing to follow the forfeiture standards prescribed in the cases in the record (R. 21 and R. 72E-72F), (2) in denying defendant's motions to suppress and dismiss, and (3) in forfeiting the motorcycle", however provides no legal analysis and based upon State v. Amicone, 689 P.2d 1341 (Utah 1984), this Court should decline to rule on the arguments.

It appears that defendant motorcycle is arguing that it was error for the trial court to deny its motion to dismiss the complaint and quash the notice of seizure and intent to forfeit. However, defendant motorcycle fails to demonstrate in what ways the court erred and abused its discretion. If defendant motorcycle is attempting to collaterally challenge the seizure of contraband at the time of or subsequent to the arrest of Erickson, then that is outside and beyond the scope of the

matters before this Court. Erickson's convictions have been affirmed on appeal. State v. Erickson, 722 P.2d 756 (Utah 1986).

The trial court did not abuse its discretion in forfeiting defendant motorcycle and in denying motions to suppress and dismiss.

In drafting § 58-37-13, the Legislature included certain exemptions from forfeiture. The exemptions in the forfeiture section are found in § 58-37-13(1)(e)(i) through (iii), which provide as follows:

> (1) The following shall be subject to forfeiture and no property right shall exist in them:
>
> (e) All conveyances including aircraft, vehicles or vessels or vessels used or intended for use, to transport, or in any manner facilitate the transportation, sale, receipt, possession, or concealment of property described in (1)(a) or (1)(b) of this section, except that:
>
> (i) No conveyance used by any person as common carrier in the transaction of business as a common carrier shall be forfeited under this section unless it appears that the owner or other person in charge of the conveyance was a consenting party or privy to violation of this act; and
>
> (ii) No conveyance shall be forfeited under this section by reason of any act or omission established by the owner to have been committed or omitted without his knowledge or consent; and
>
> (iii) Any forfeiture of a conveyance subject to a bona fide security interest shall be subject to the interest of the secured party upon the party's showing he could not have known in the exercise of reasonable diligence that a violation would take place in the use of the conveyance.

The Legislature has not included exceptions for quantity of the controlled substance transported, the value of the controlled substance in comparison with the value of the vehicle, nor the value of the vehicle to be forfeited.

In the case of State v. Chambers, 533 P.2d 876, 879 (Utah 1975), this Court held that

> if discretion is reasonably used, and is not shown to have been abused, arbitrary, or capricious, the judgment of the trial court should not be disturbed.

The facts and the applicable statute in the present case clearly indicate that defendant motorcycle should be forfeited and the judgment of forfeiture affirmed. If the trial court were to take upon itself to add exceptions to a statute that is clear on its face, as is requested by appellant, then the court would be acting in an arbitrary and capricious manner. However, the trial court acted reasonably and within its proper discretion, therefore its judgment should not be disturbed on appeal.

The language of § 58-37-13 is plain and its meaning is clear. This Court in In re Stevens Estate, 130 P.2d 85, 86-87 (Utah 1942) held:

> This court will not read into this statute by judicial legislation the words "or has some interest, direct or indirect." The language of the statute is plain and its meaning is clear, in which case there is no occasion to search for its meaning beyond the statute itself.

Jurisdictions with forfeiture statutes similar to Utah's have held that under similar fact situations the vehicle should have been forfeited. Only a small number of states allow forfeiture for mere possession. See Matter of 1972 Chevrolet Monte Carlo, 573 P.2d 535 (Arizona 1977), State v. One Certain Conveyance, 211 N.W.2d 297 (Iowa 1973) and State v. One 1970 2-

Door Sedan Rambler (Gremlin), 215 N.W.2d 849 (Neb. 1974). Virtually all states, however, allow forfeiture for distribution when the act results in a felony charge and/or a possible fine of up to $5,000.00.

In the matter of One 1965 Ford Econoline Van v. State, 591 P.2d 569 at 572 (Arizona 1979) the Arizona Supreme Court cited One Porsche 2-Door, supra, at 919, and that the Utah Supreme Court intended that the forfeiture statute did not apply to possession, but was "directed exclusively toward the transportation of a controlled substance for distribution according to erstwhile law merchant principles, and not for personal possession and consumption." The facts before the Court clearly indicate distribution for value, and clearly fall within the legislative intent of § 58-37-13.

In light of the foregoing, it was clearly within the trial court's discretion in its interpretation of the facts and how the facts should apply to § 58-37-13 and order forfeiture.

Apparently defendant motorcycle argues the trial court erred in denying its motions to suppress and dismiss. However, the argument is without merit.

The State agrees with the notion that the exclusionary rule might apply in cases of forfeiture but denies there was any illegal search which would trigger such an exclusion in the case before the Court. When Erickson obtained the controlled substances from defendant motorcycle to sell them to Paquette, he did so in a parking lot open to the public view (R. 142, 143, 193, 194, 207, 208-209, 215-216, 239-241, 257, 258, 283). He

later admitted after two Miranda warnings that he had made such a sale (R. 221-222, 223, 226).

Apparently defendant motorcycle argues that a warrant was necessary before the officers could seize defendant motorcycle. Such assertion ignores the express language of the forfeiture statute which allows seizure without a warrant under 58-37-13(2).

> However seizure without process may be made when:
>
> (a) The seizure is incident to an arrest or search under a search warrant or an inspection under an administrative inspection warrant; . . .
>
> (d) The peace officer has probable cause to believe that the property has been used or intended to be used in violation of this act.

Section 58-37-13(2).

The seizure was made incident to the arrest of Erickson on the 3rd day of June, 1985 (R. 183, 231). If the officers had left the defendant motorcycle at Erickson's office while taking Erickson into custody, defendant motorcycle may have been damaged or removed by someone. The seizure was also based upon probable cause. The officer seizing defendant motorcycle had seen Erickson remove controlled substances from defendant motorcycle for sale to an undercover officer on the 24th day of May, 1985, and had listened to a conversation wherein Erickson agreed to sell controlled substances to an undercover officer (R. 231).

The recording of Erickson's conversation with the undercover officer is not subject to exclusion as is clearly pointed out in State v. Boone, 581 P.2d 571 (Utah 1978), where the Court stated,

> As to the invasion of privacy, the defendant says the undercover agent who purchased the drug had an electronic broadcasting instrument attached to his body which emitted voice sounds, and some police officers working with the agent overheard the conversation by and between the defendant and agent. He also says that his right to privacy is protected by the Fourth Amendment to the Constitution of the United States and by Article One, section fourteen of the Utah Constitution. Any rights which he might have under the Fourth Amendment would be against any encroachments by the federal authorities; however, the provisions of our state constitution (above cited) afford him the same protection against state intrusions.
>
> In either case there is no violation.

In fact, a majority of the members of the U.S. Supreme Court held in the case of U.S. v. White, that police eavesdropping on a conversation between an accused and an informant by means of a radio transmitter concealed on the person of the informant does not violate the Fourth Amendment. U.S. v. White, 401 U.S. 745, 92 S.Ct. 1122 (1971).

The trial court did not abuse its discretion in forfeiting the defendant motorcycle and in denying motions to suppress and dismiss.

CONCLUSION

Based upon the foregoing, the judgment of forfeiture should be affirmed.

RESPECTFULLY submitted this 1 day of December, 1986.

DAVID L. WILKINSON
Attorney General

Diane W. Wilkins

DIANE W. WILKINS
Assistant Attorney General

MAILING CERTIFICATE

I hereby certify that I mailed four true and accurate copies of the foregoing brief to Walker E. Anderson, attorney for appellant, 660 South 200 East, Salt Lake City, Utah 84111, postage prepaid, this 1 day of December, 1986.

Diane W. Wilkins